EQUITABLE SUBSTITUTION OF MORTGAGES. — A party advances money with which a first mortgage is removed and accepts a new mortgage of the same property as security. There is an outstanding judgment against the mortgagor. Should the judgment be allowed to operate as a first lien on the mortgagor's property, or is the new mortgagee equitably entitled to priority? This question was answered in two recent cases, in both of which the courts proceeded on the theory of subrogation. One court considered the new mortgagee a volunteer and not entitled to the position of the original mortgagee. *Nelson* v. *McKee*, 99 N. E. 447 (Ind.). The other reached a contrary result. *Frederick* v. *Gehling*, 137 N. W. 998 (Neb.).[1]

The frequent statement that a mere volunteer is not entitled to subrogation is confusing and probably unsound.[2] What persons are volunteers is a matter of great uncertainty.[3] The term is usually applied to any person who is refused subrogation.[4] But it is not necessarily applicable to one who becomes surety against the expressed will of the debtor.[5] Moreover, the doctrine of equitable substitution is clearly not confined to cases where one party pays the debt of another under compulsion, as in the case of a surety; or for self-protection, as in the case of a subsequent incumbrancer. But it is extended in favor of a party who paid the debt acting under a mistake,[6] or induced by fraud.[7] Furthermore, an agreement for substitution is recognized, and if not expressed is freely implied.[8] It is also settled that purchasers at a void judicial sale, whose money is used to pay off valid claims against the property, are equitably entitled to the position of the claimants.[9] The same is true where the sale was by a mortgagee under a power.[10] And where a party advances money with which a valid mortgage is removed and takes a defective mortgage on the same property as security, he is equitably entitled to have the valid mortgage reinstated for his benefit.[11] The same principle applies in cases analogous to those under

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[1] The decision in this case may be reconciled with the other. See *infra*, p. 273. The value of the property, which was sold to the judgment creditor on execution, was sufficient to satisfy both claims, and since the amount of the mortgage was deducted in the appraisement, it was properly chargeable to the purchaser as part of the price. Otherwise, the sale could have been vacated. See 2 FREEMAN, EXECUTIONS, §§ 284, 309.

[2] *Cf.* 13 HARV. L. REV. 297.

[3] *Cf.* BISPHAM, PRINCIPLES OF EQUITY, § 337; SHELDON, SUBROGATION, § 245.

[4] *Cf.* 6 POMEROY, EQUITABLE REMEDIES, § 921, n. 86.

[5] Mathews *v.* Aikin, 1 N. Y. 595.

[6] Butler *v.* Rice, 103 L. T. R. 94. By the better view, it makes no difference whether the mistake is one of fact or of law. Coudert *v.* Coudert, 43 N. J. Eq. 407. *Contra*, Brown *v.* Rouse, 125 Cal. 645, 58 Pac. 267.

[7] Bolman *v.* Lohman, 74 Ala. 507; Zinkeison *v.* Lewis, 63 Kan. 590, 66 Pac. 644.

[8] Tradesmen's Building, etc. Association *v.* Thompson, 32 N. J. Eq. 133; Home Savings Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161; Gans *v.* Thieme, 93 N. Y. 225.

[9] Davis *v.* Gaines, 104 U. S. 386; Dutcher *v.* Hobby, 86 Ga. 198, 12 S. E. 356; Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813; Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33. *Cf.* Vasser *v.* City of Liberty, 50 Tex. Civ. App. 111, 110 S. W. 119; Reed *v.* Kalfsbeck, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466; 10 HARV. L. REV. 453.

[10] Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857; Givens *v.* Carroll, 40 S. C. 413, 18 S. E. 1030.

[11] Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453; Hughes *v.* Thomas, 131 Wis. 315, 111 N. W. 474; Homeopathic Mutual Life Ins. Co. *v.* Marshall, 32 N. J. Eq. 103.

discussion where a first mortgagee accepts a new mortgage which although not defective is subsequent in time to another incumbrance.[12] The result should be the same where the new mortgagee is a third party who furnished money to remove the first mortgage.[13]

Equitable substitution is invoked in these cases[14] simply as an appropriate means of preventing unjust enrichment. It has no technical requirements.[15] It is believed that the judgment creditor in both cases under discussion was unjustly enriched. As a matter of substance the transaction was a substitution of the new mortgage in the place of the old mortgage, and the mere form of the transaction should not be the basis of equitable priority. The security of the judgment creditor should not be advanced at the expense of the mortgagee. It is not enough to justify equitable substitution that the judgment creditor would be left in no worse position, but it is submitted that the doctrine should be applied to prevent the judgment creditor from enjoying an inequitable advantage. If the mortgagee paid the judgment creditor money under a mistake, it would be unconscionable for the judgment creditor to insist upon his legal title to the money. The unjust enrichment in the present case, although not so palpable is none the less real. The argument that the new mortgagee was negligent in not looking up the record of the judgment[16] and that the judgment creditor had an equal equity confuses the doctrine of purchaser for value without notice with the doctrine of equitable substitution for the prevention of unjust enrichment.

ASSUMPTION OF RISK AS A DEFENSE WHERE THE NEGLIGENCE IS A BREACH OF A STATUTORY DUTY. — The doctrine of assumption of risk, although most often arising in cases between master and servant, is not confined to such cases, nor to those where the parties are in contractual relation to each other.[1] But in many situations where one person would ordinarily have a duty to abstain from or prevent an injury to another, this duty may be removed if the person to whom the duty is owed voluntarily and appreciating all the facts subjects himself to the danger.[2]

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[12] Bruse *v.* Nelson, 35 Ia. 157; Campbell *v.* Trotter, 100 Ill. 281; Geib *v.* Reynolds, 35 Minn. 331; Wooster *v.* Cavender, 54 Ark. 153, 15 S. W. 192.

[13] Tyrrell *v.* Ward, 102 Ill. 29, 16 HARV. L. REV. 525. *Cf.* Tradesmen's Building, etc. Association *v.* Thompson, *supra*; Home Savings Bank *v.* Bierstadt, *supra*; Bruse *v.* Nelson, *supra*. *Contra*, Fort Dodge Building and Loan Association *v.* Scott, 86 Ia. 431, 53 N. W. 283; Mather *v.* Jenswold, 72 Ia. 550, 32 N. W. 512, 34 N. W. 327. *Cf.* Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374. See Holt *v.* Baker, 58 N. H. 276, for a case where an intervening incumbrancer relied upon the discharge of the first mortgage.

[14] For other cases see 1 JONES, MORTGAGES, §§ 874–885.

[15] See Merchants' and Miners' Transportation Co. *v.* Robinson-Baxter-Dissosway Towing and Transportation Co., 191 Fed. 769, 772.

[16] Fort Dodge Building and Loan Association *v.* Scott, *supra*; Mather *v.* Jenswold, *supra*.

[1] Ilott *v.* Wilkes, 3 B. & Ald. 304; Rase *v.* Minneapolis, St. P. & S. S. M. R. Co., 107 Minn. 260, 120 N. W. 360.

[2] Such intelligent choice of a dangerous situation, whereby the performance of a duty of protection is waived is entirely distinct from contributory negligence, which does not remove the duty but merely affords a defense. See Thomas *v.* Quartermaine, 18 Q. B. D. 685, 697, 702.